

CALCUTTA HIGH COURT

Peary Mohan Maiti

Vs

Sreenath Chandra Maiti

(Doss ,J.)

25.08.1908

JUDGMENT

Doss, J.

1. This appeal arises out of a suit to enforce a registered mortgage bond. It was executed by five persons and signed by four attesting witnesses. One of the executants, viz., defendant No. 2 was also the scribe of the document. The suit was contested by defendants Nos. 8 to 13, who are subsequent purchasers of the mortgaged properties. The other defendants, viz., defendants Nos. 1 and 2 who executed the mortgage bond and defendants Nos. 3 to 7 who are the representatives of the three remaining executants, did not appear.

2. The contesting defendants, in their written statement, said that they did not know anything about the mortgage bond and further that they did not admit that the bond was executed in good faith or that consideration money was paid.

3. The first issue raised was "Is the mortgage bond in suit a bona fide transaction for valuable consideration." The two other issues related to the title of the contesting defendants and to the question of interest. No issue was raised as to the execution of the bond.

4. The only witness examined in the case on behalf of the plaintiff was the defendant No. 2. No evidence was adduced on the other side.

5. The Munsif relying upon the deposition of this witness held that the mortgage bond was a bona fide transaction, and that the consideration was paid.

6. Defendants Nos. 8 to 13 appealed from this judgment to the Subordinate Judge and raised only two points before him. First, that the Munsif was wrong in rejecting their prayer for time, which, however, has been found against them, and the second, "that the mortgage bond has not been legally proved against them."

7. As regards this latter point, the learned Subordinate Judge in his judgment says "He" (i.e., the defendant No. 2) "wrote his name as scribe in the bond and also wrote his name as an executant, so as he may be called a witness to the bond, so far as regards the other defendants in this case" and then he goes on to say "although he may not be a witness as regards his own execution."

8. Relying on the case of *Jogendra Nath v. Nitai Churn*¹, he has held that the scribe in this case is a competent witness in the sense that he may properly be regarded as an attesting witness.

9. He was, however, of opinion that as against defendant No. 2 himself, his own admission as to execution of the bond was not relevant and he accordingly directed that the name of defendant No. 3 should be expunged from the decree.

10. Defendants Nos. 8 to 13 have appealed to this Court and on their behalf it has been contended that the learned Subordinate Judge is in error in holding that defendant No. 2 could be regarded as an attesting witness. I think this contention is sound. The word "attestation" means that the persons shall be present and see what passes, and shall, when required, bear witness to the facts [*Bryan v. White* ² *Robertson*²; *Sharpe v. Birch*³]. The real and essential objects of attestation, in cases where the law requires a document to be attested, is protection against forgery, force, fraud or undue influence. Wigmore on Evidence, Vol. III, p. 1233. In *Wright v. Tatham*⁴ Tindal, C.J., thus stated the object of the law in requiring a Will to be attested, the statute intending that three witnesses should be in the nature of grounds or securities to protect him in the execution of his Will against force or fraud or undue influence." This object can hardly be attained, unless indeed the document be attested by some independent person, not a party to the transaction [*see Freshfield v. Read*⁵]. In *Seal v. Claridge*⁶, Lord Selborne, L.C., observed: "It" i.e., the attestation, implies the presence of some person, who stands by but is not a party to the transaction." It is on this principle that it has been held, in the case of documents required by law to be attested that even testimony of parties to the document cannot dispense with, the necessity of calling the attesting witness. See *Petru v. Wilson*⁷ *Fletcher v. Perry*⁸ *Kayser v. Sichel*⁹ *Van Dyne v. Thayre*¹⁰ *Willoughby v. Carleton*¹¹ In *Van Dyne v. Thayre*¹², it was expressly decided by the Supreme Court of New York that the obligor of a bond cannot prove the execution of it by his co-obligors, unless at least one attesting witness has been called, or his absence accounted for.

11. In *Jogendra Nath v. Nitai Churn* 7 C.W.N. 385, the scribe was rightly held to be an attesting witness because he was found to have not only written the bond, but also to have seen the execution of it, and what is most important, was himself no party to it.

12. It is quite clear, therefore, that defendant No. 2 could not, under the law, be brought within the category of an attesting witness, even though he may have been present at the execution of the bond, nor is his evidence the evidence of an attesting witness.

13. Section 68 of the Evidence Act provides that where a document is required by law to be attested (a mortgage bond is by Section 58 of the Transfer of Property Act required to be attested), it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. If then one or more of the attesting witnesses to the bond in question are alive and subject to the process of the Court and capable of giving evidence one of them at least must be called to prove its execution before any other evidence can be received. But if no such attesting witness be available it is then and then only that the evidence of defendant No. 2 may be received in proof of the execution and attestation of the bond under Section 69 of the Act.

14. I am unable to agree with the learned Subordinate Judge in his view that the admission of execution of the bond by the defendant No. 2 himself is not receivable in proof of such execution and I think he has overlooked the provision of Section 70 of the Evidence Act.

15. The execution and attestation of the bond having, therefore, not been proved in the mode required by law the case must go back to the learned Subordinate Judge who shall send it down to the first Court for taking the evidence of an attesting witness if produced by the plaintiff and for a finding on such evidence as to the execution and attestation of the mortgage bond or, if no attesting witness is produced, for a finding whether or not any attesting witness is alive and subject to the process of the Court and capable of giving evidence. The learned Subordinate Judge should also report his own finding on those points.

16. The appeal will remain on the file of this Court. The question of costs will be considered at the final hearing.

17. The lower appellate Court having duly caused the evidence to be taken as directed by the Court of first instance and sent up its findings on the entire evidence, the High Court (Brett and Sharf-ud-din, JJ.) disposed of the appeal finally on 3rd December 1909 in the following terms. The case having gone back through the lower appellate Court to the Court of first instance, an attesting witness who appears to be the only one of those whose names appear on the bond, who is now alive, has been examined and the result of his examination has been considered by the Court of first instance and the lower appellate Court. The conclusion at which the lower appellate Court has arrived is that that evidence is sufficient with the evidence on the record to prove that the mortgage bond was duly executed by all the persons whose names appear on that bond as executors. That being so, there is no reason to interfere with the findings and decree of the lower appellate Court. The appeal is, therefore, dismissed with costs.

Cases Referred.

3(1882) L.R. 8 Q.B.D. 111 : 51 L.J.Q.B. 64 : 45 L.T. 760 : 30 W.R. 428 : 46 J.P. 246
4(1834) 1 Ad. & El. 3 at p. 23 : 3 L.J. Ex. 63 : 3 N. & M. 268
5 9 M. & W. 404
6(1881) L.R. 7 Q.B.D. 516 : 50 L.J.Q.B. 316 : 44 L.T. 501 : 29 W.R. 598
7104 Ala. 157 : 16 South 143
823 S.E. 824
934 Barb 84
1019 Wend. 162
119 Jones 136
1219 Wend. 162